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[Review Of] Debating the Death Penalty: Should America Have Capital Punishment? The Experts on Both Sides Make their Case.

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In this edited volume, Bedau and Cassell assemble a variety of authors to debate whether capital punishment has a place in current American jurisprudence. The authors come from a variety of professions - judges, academicians, defense attorneys, philosophers, etc. - in order to provide what the authors feel is a broad spectrum of opinions on the use of capital punishment. The justifications that these authors give for either supporting or opposing capital punishment are indeed broad, and the editors do a very good job of covering most of the relevant arguments in the capital punishment debate.

The first chapter is written by Alex Kozinski, a judge on the Ninth Circuit Court of Appeals. Kozinski supports the use of capital punishment, although he readily admits his uneasiness for doing so. His chapter discusses his emotions after he signed his first death order. While he believes he did the correct thing, he still felt uneasy about doing so. His doubts are more or less erased when he thinks of the victims of murder. He states that, "we tarnish the memory of the dead and heap needless misery on their surviving families by letting the perpetrators live" (p. 4). Kozinski does realize that the wrong person has and will be executed in the future, especially given the new federal rules that hurry executions along, but he always turns back to the victims of these crimes to justify his support of capital punishment. His arguments are not premised on sophisticated research or deep philosophical issues, but on his personal view of how murder affects the lives of the families of victims.

Chapter two is written by one of the editors of the book, Hugo Adam Bedau, a retired faculty member from Tufts University and outspoken critic of capital punishment. He begins his chapter by stating that he is vehemently opposed to capital punishment, and this is reflected throughout his chapter. The chapter begins with a history of capital punishment in this country, discussing major reforms that have occurred. These reforms include distinguishing between first degree murder and other murders, ending public executions, ending mandatory death sentences by giving juries the option of life or death, prohibiting the use of some forms of execution, increasing scrutiny of death cases in federal courts, and reducing the number of crimes eligible for the death penalty. Bedau argues that we have stripped capital punishment of most of its "badness," so there is little left to challenge. Despite this, Bedau still challenges its use, providing what he calls the best argument against capital punishment: the minimum invasion principle. Essentially, Bedau argues that punishment should be only what is necessary to achieve societal goals. He states that capital punishment has not been shown to deter murderers any more than imprisonment and that retribution does not necessarily point to capital punishment as a punishment for murder, that life in prison serves a retributive purpose. Bedau's chapter is thorough and his arguments are sound, but it is doubtful that his argument that life in

prison is retributive enough is going to convince staunch supporters of capital punishment, which is what Chapter 3 encompasses.

A fervent supporter of capital punishment, Louis Pojman believes that capital punishment is morally justified. In fact, Pojman, a faculty member at the US. Military Academy, wishes to extend the use of capital punishment to those “who betray the trust of the public” (p. 72), including bank executives who swindle their employees out of their pension. Pojman supports the death penalty because he feels that those who kill deserve to die - it is desert, not revenge. Pojman argues that there needs to be a legal method of desert because, otherwise, vigilantism would result. However, Pojman does not address whether vigilantism is more prevalent in those states that do not have a death penalty.

While Pojman states that the research is inconclusive regarding whether capital punishment deters, he argues that a “common sense” argument can be made for deterrence. He assumes it deters because, “many people will be deterred from crime, including murder, by the threat of severe punishment” (p. 61), but he gives no examples. He does mention that morality plays a role here, but it appears that Pojman believes that severe punishment deters more than morality.

Finally, Pojman discusses the opposition arguments of actual innocence and racial discrimination. Essentially, Pojman states that imperfect justice is the best that we can attain, and that innocents will be executed and racial discrimination might occur. However, according to Pojman, capital punishment saves more lives (through deterrence) than kills innocent people. He also states that he supports capital punishment because he highly values human life, though his willingness to sacrifice innocent people for the good of society as a whole seems inconsistent and contrary to our notions of individual justice.

Chapter four is written by Bryan Stevenson, the executive director of the Equal Justice Initiative of Alabama. Stevenson discusses his experience as a defense attorney in the state of Alabama, especially at the appellate level, and what he sees as serious racial discrimination in the use of capital punishment. Stevenson asserts that most reasonable people would agree to abolish capital punishment if they knew how it was administered.

Stevenson uses the example of Walter McMillian, a black man who spent six years on death row for a crime he did not commit to demonstrate his argument. In this case, the Monroe County, Alabama, sheriff’s office accused McMillian of murdering a young, white, female student. The sheriff’s office made numerous racist remarks to McMillian, elicited false statements from “witnesses,” hid exculpatory evidence from the defense, and illegally housed him on death row while he was only a pre-trial detainee. Although the jury recommended life, the trial judge sentenced McMillian to death. Stevenson took on McMillian’s case on appeal, and he was released from death row after “witnesses” recanted their testimony and evidence of the frame-up was uncovered.

Thus, Stevenson puts a personal face on capital punishment and illustrates how the criminal justice system makes mistakes, both deliberately and accidentally, in these particular cases.

Chapter five is written by Joshua Marquis, a district attorney in Oregon. Marquis discusses the practical aspects of capital punishment and tests some of the arguments of those who oppose its use. Marquis indicates that he has never asked for the death penalty unless he can argue convincingly to the jury that a particular defendant deserves it. He takes these decisions very seriously. He points to what he calls “urban myths” of opponents: innocents crowd death row,

the death penalty is racist, and the poor get treated harshly. Regarding the innocence issue, Marquis maintains that extensive due process protections and the use of DNA greatly minimize the risk of innocents being sent to death row. Accordingly, the vast majority of people on death row are purported to be factually guilty, and there is also a risk of freeing defendants who deserve to be on death row.

Marquis also maintains that there are numerous safeguards in place to guard against racial discrimination in the imposition of capital punishment. He correctly notes that, consistent with contemporary research, there is little evidence that racial minorities are more likely to receive the death penalty when other relevant factors are considered (see Baldus and Woodworth, 1998). Despite this, Marquis fails to consider the race of victim disparity that has been found in recent research (see Baldus and Woodworth, 1998; Pierce and Radelet, 2002).

Marquis also discusses the defense of capital murders in the state of Oregon. He states that indigent defendants receive more than adequate representation, to such an extent that O.J. Simpson's "Dream Team" would be proud. While this may be true in Oregon, other states do not necessarily have such systems, as evidenced by Stevenson's earlier essay on indigent defense in Alabama.

The sixth essay is written by Stephen Bright, director of the Southern Center for Human Rights in Atlanta. Bright claims that the United States will eventually abolish capital punishment, though he is less certain as to when that will be. Bright states that any assessment of capital punishment cannot be based on how it should work or how it works in jurisdictions that rarely impose the death penalty (such as Marquis's home state of Oregon). Instead, capital punishment ought to be assessed on how it is implemented in states that carry out many executions. These states have an increased likelihood of executing the innocent and histories of not providing the best representation for clients.

Bright first discusses the deterrence argument, claiming that capital punishment is not needed for such a purpose. Maximum security prisons punish and isolate offenders from society very well. According to Bright, if capital punishment deters, the South, which has carried out 85 percent of all executions since 1976, should have the lowest, rather than the highest, murder rate of any region in the country.

Bright also makes a human rights argument by noting that the United States tries to ensure that other nations abide by human rights provisions, yet the U.S. is joined by China, Iran, and Saudi Arabia as the four countries that account for 90 percent of executions. This puts the US. on par with these countries that are notorious for human rights violations.

Bright challenges those who claim that, since innocent people have been exonerated by the court system (through DNA testing and the like), the system is working to ensure that no innocent people are executed. On the contrary, states Bright, having to spend years on death row for a crime not committed is evidence that the system is not working. He challenges the lack of consistency in the application of the death penalty by prosecutors nationwide. According to Bright, this increases the likelihood of bias in the implementation of capital punishment. Since prosecutors (and judges) are elected officials, their political future is determined by appeasing the public, which supports the use of capital punishment.

Bright, like Stevenson, attempts to put a personal face on the use of capital punishment. He admits that there are bad people in the world, but that does not justify the use of a practice that

is so inherently flawed that most “bad” people are not executed and a fair number of “not so bad” people are.

Chapter seven is written by one of the editors of the book, Paul G. Cassell, a U.S. District Court Judge for the District of Utah. Cassell chastises opponents of capital punishment for putting a personal face on the wrong person - the offender. Instead, Cassell reminds opponents to think of the victims in these cases and to focus on the brutality of many of the crimes that eventually lead offenders to be sentenced to death.

Cassell argues that capital punishment is a specific deterrent; obviously, once an offender is executed, he or she cannot commit another murder. He estimates that executing offenders after their first murder conviction saves the lives of over 800 persons. However, he provides no explanation of how he arrived at this number. According to Cassell, it is only logical that capital punishment will deter some murderers. He offers anecdotal evidence of offenders who state that they can get away with murder because there is no death penalty. He also offers statistical evidence from Dezhbakhsh et al. (2001) from Emory University, who show that, on average, each additional execution during 1977 and 1996 resulted in 18 fewer murders. Despite this, Cassell ignores other evidence that shows that capital punishment not only does not have a deterrent effect, but has been associated with an increase in homicides in some jurisdictions (see Bailey, 1998).

Regarding research that suggests that race-of-victim bias plays a role, Cassell argues that white-on-white and black-on-black homicides are garden variety homicides - altercations between acquaintances - but that black-on-white homicides are more likely to involve aggravating factors - felony murder, killing a police officer, etc. This is the reason for a death sentence, not the race of the defendant or victim. Recent research that has found race-of-victim bias, however, has controlled for such aggravating factors and continue to find disparity (see Pierce and Radelet, 2002; Baldus, Pulaski, and Woodworth, 1983).

Finally, Cassell attacks actual innocence claims and ineffective assistance of counsel. He argues that opponents of capital punishment do not provide any evidence that a factually innocent person has been executed in the modern era. Also, ineffective assistance of counsel is only shown through anecdotal evidence - is there evidence of systemic ineffectiveness? The final chapter is a text of former Illinois Governor George Ryan's speech regarding the commutation of all of Illinois's death sentences. Ryan states that the United States, "...[is] partners in death with several third world countries" (p.220) when it comes to the use of capital punishment.

His decision was based on his assessment that the use of capital punishment in Illinois was not uniformly applied, noting that an offender was five times more likely to get a death sentence in a rural area than in an urban area. He also mentions that over half of nearly 300 capital cases in Illinois had been reversed for a new trial or resentencing - some offenders were represented by attorneys who were later disbarred, some black offenders were convicted by all-white juries, and some were convicted on the basis of information provided by jailhouse informants. After reviewing these and other cases and discussing the issues with world leaders, attorneys, victims' families, and others, Ryan asked himself, "could I send another man's son to death under the deeply flawed system of capital punishment we have in Illinois" (p. 223)? He indicates how this was a profound struggle for him, especially after speaking with victims' families, but he felt that the legislature was not going to reform the system anytime soon, so he felt he had to act.

In conclusion, the arguments presented in this book are fairly comprehensive, yet arguments in support of capital punishment tend to be more moralistic and make questionable assumptions given the considerable body of evidence on the various issues regarding capital punishment. In particular, Pojman's position appears to be rather extreme and violates fundamental principles of due process. Regardless of one's position on the issue, it is necessary to maintain standards of fairness and justice in a country that espouses such virtues.

REFERENCES

Bailey, W. (1998). "Deterrence, Brutalization, and the Death Penalty: Another Examination of Oklahoma's Return to Capital Punishment." *Criminology*, 36:711-734.

Baldus, D. and G. Woodworth. (1998). "Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview with Recent Findings from Philadelphia." *Cornell Law Review* 83: 1638-1 770.

Baldus , D., Pulaski, C., and G. Woodworth. (1983). "A Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience." *Journal of Criminal Law and Criminology* 74:66 1-754.

Pierce, G. and M. Radelet. (2002). "Race, Region, and Death Sentencing in Illinois, 1988-1997." *Oregon Law Review* 81:39-96.